§ 66. In conclusion, it may be remarked that the general rule of law seems to be that no person should be both judge and witness in the same case,[1] especially if there be only one judge.[2] Public policy would dictate the same rule.[3] Perhaps a judge may swear to matters of public notoriety.[4]

D. B. E.

Burlington, Vt.

RECENT AMERICAN DECISIONS.

In the District Court of the United States for the South Carolina District—In Admiralty.

IN THE MATTER OF DANIEL SINCLAIR, PART OWNER OF SCHOONER ELLA.

1. Where a libel was filed *in rem* and *in personam* for damages sustained by a consignee in consequence of the schooner's springing a leak by reason of her unseaworthiness, it was held, that the owner could not protect himself against the *in personam* proceeding by surrendering his interest in the schooner and claiming exemption under the Act of Congress of March 3, 1851, ch. 43, 9 Stat. at Large p. 635.

2. This act is not to be confined to torts alone; but there being a representation of seaworthiness proceeding from the owner or his agent, there may be a breach of the contract arising from such representation, for which the owner will be liable *in personam*, under the true construction of the act of 1851.

Christobal Bravo, and others, consignees of merchandise shipped on board of the Schooner Ella, filed their libel *in rem* and *in personam*, to recover damages sustained by them in consequence of the

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was allowed to testify to the amount of her own and her husband's wearing apparel lost in their trunk. Thomas *vs.* Hargrave, Wright, 595.

[1] 2 Taylor's Ev. § 1011. If sitting with others, Mr. Taylor thinks he may be sworn, but says he should take no further part in the trial, Regicides, Kel. 12. 5 How. St. Tr. 1181, n.

[2] 2 Taylor's Ev. § 1011; R. *vs.* Buhler, 2 Martin's R. N. S. 312, but see 11 How. St. Tr. 459; Tait. Ev. 432.

[3] Regina *vs.* Gazard, 8 C. & P. 595; R. *vs.* Earl of T. 27 How. St. Tr. 847, 848

[4] 1 Greenlf. Ev. §§ 364, 294, 166; Glassford Ev. 602; Erskine's Inst., book 4 tit. 2, 33. A juror is competent. R. *vs.* R., 7 C. & P. 648, 1 Greenlf. Ev. 364, note (1

vessel, immediately after her departure, springing a leak. The water gained upon her so rapidly, that she was run ashore. The goods on board of her were greatly damaged. The pleadings in the case having been made up, and the evidence taken, the cause was heard, and a decree made on the 9th June, 1858. By the decree the vessel was condemed and ordered to be sold. Daniel Sinclair, one of the owners of the Ella, against whom process of foreign attachment had issued, and under which process, certain property belonging to him had been attached, filed his petition to be allowed to surrender his interest as part owner of the schooner Ella, and her freight, in discharge of all further personal liability on his part; and contended that such was his right under the Act of Congress, passed the 3d March, 1851, ch. 43. The following opinion of the court, upon the question made in the petition, was pronounced by

MAGRATH, J.—The petitioner has applied to this court for the benefit, to which he claims to be entitled under the Act of Congress of the 3d of March, 1851, ch. 43. A libel has been filed against the schooner Ella, and process *in personam* has also been asked against the petitioner as one of the part owners. The principal case has been heard; and the decree of this court establishes the unseaworthiness of the vessel as the cause of the damage to the goods. The vessel has therefore been condemned. The amount of the damage claimed by the shippers is much more than the value of the vessel; and the application now is to limit the liability of the petitioner to the value of the vessel and her freight; and upon the surrender of his interest in the same, to cause all proceedings against him to be stayed. The application has been resisted with zeal and ability; and I will consider the various objections which were presented, in the examination which I am about to make. The question involved is of great practical importance; and the conclusion at which I have arrived, as to the true construction of the act referred to, is the result of the most careful consideration I could afford.

The leading principles which in the United States are applied in cases of the liability of a carrier, have been derived from Great Britain. Here and there, modifications, involving qualifications of

their application, have been introduced; but the leading tests laid down are still regarded as the canons of construction. To the transportation of property by water, the rule applicable to a common carrier is referred. And in contracts made by the master in pursuance of any express direction, or by virtue of the authority confided to him, and in the proper execution of his duty, the owner is held liable without limitation of that responsibility. 2 Kent, 609. The rule of the civil law, in regard to the obligations of the owner, resulting from the contracts or torts of the master, is similar to the rule of the common law. 3 Kent, 258. But the general maritime law recognized a different rule; and by it, the liability of the owner was not enforced beyond his share or interest in the vessel and the freight which was due. 3 Kent, 217; 1 Boul. Paty, 273. The rule of the common law in Great Britain was modified in 1734 by the passage of the 7 Geo. 2, ch. 18; the consequence of a petition of merchants, who, alarmed by the case of *Boucher* vs. *Lawson*, in which the owner was sued for coin embezzled by the master, sought protection by an act of parliament. The act recites the evil, as it has just been stated, and then declares that the liability of the owner shall not extend beyond the value of the ship and freight. Abbott, 488. Soon after the case of *Sutton* vs. *Mitchell*, 1 T. R. 18, was tried; where the question arose as to the right of the owner to this limitation of his liability, when the act was the act of a stranger, and not of the master or mariner. And this was followed by the 26 Geo. 3, ch. 86, 1786, in which the 7 Geo. 2, ch. 18, was amended. Without referring here to other statutes, which, in certain cases to which they refer, have modified the liability of the owner, I may come directly, in connection with the question before me, to the 53 Geo. 3, ch. 159, in which material modifications were further made; and the 17 and 18 Victoria, ch. 194, in which all acts in reference to this question have been included, and which is now the law of Great Britain. In the United States, a statute was passed in Massachusetts; one of the same import in Maine; and the Act of Congress of 1851, are the only legislative exceptions to the general liability. In cases to which these are not applicable; or in which the owner has not limited his obligations by a special con-

tract, excluding his liability in certain enumerated cases; the rule of the common law, as it was in Great Britain and in the United States before these statutes, is still enforced. 3 Kent, 217. The third section of the act of 1851 provides, that the liability of the owner of a vessel for the embezzlement, loss or destruction by the master, officers, mariners, passengers, or any other person or persons; of any property goods or merchandise, shipped or put on board such vessel; or for any loss, damage, or injury by collision: or for any act, matter or thing, loss, damage, or forfeiture, done, occasioned or incurred without the privity or knowledge of such owner; shall not exceed the value of the interest of such owner in the ship or freight. 9 Statutes at Large, p. 635. The act passed by the State of Massachusetts is very similar to the act of 1851. And in *Pope* vs. *Nickerson*, 3 Story, 495, Judge Story says: "it admits of most serious doubt whether the statute of Massachusetts was designed to apply to any cases of contract, strictly within the scope of the authority of the master, and in respect to which he not only had the right to bind the owner, but his acts were justifiable and proper, and, indeed, throughout, a part of his duty under the circumstances." In *Stinson* vs. *Wyman*, Davies, 173, Judge Ware held, that the statute of Maine applied not only in cases of the fault or negligence of the master, but also in cases of his direct and wilful fraud. And in the *Rebecca*, Ware, 197, Judge Ware, in a note appended to his decree, enters upon a learned examination of the question, concurring in a great measure with Judge Story; and to his opinion I shall have occasion again to refer.

As far as I know, the case before me is among the first which has made it necessary to consider the scope and operation of the act of 1851. It is proper, therefore, to bear in mind the words of the act, for the question is one of construction. The section which refers to this case is divided into three parts: *first*, the embezzlement, loss or destruction by the master, officers, mariners, passengers, or any other person or persons, of property shipped or put on board: *next*, the loss, damage, or injury by collision: *next*, any act, matter or thing, loss, damage or forfeiture done, occasioned, or incurred without the privity or knowledge of the

owner. These words, "without the privity or knowledge of the owner," necessarily first arrest our attention, and are really the key to the question of the application of this section to cases of contracts: for, as it excludes cases in which the "privity or knowledge" of the owner occur, it must, unless otherwise explained, exclude contracts; inasmuch as every valid contract includes the idea of the "knowledge" of the parties, and implies a "privity" between them. This "knowledge" and this "privity" equally arise, whether the contract is made by an agent in the exercise of sufficient authority; or by the principal in person; or by an agent not authorized at the time of making the contract; but whose act the principal has made binding, either by express adoption, or any other mode of ratification. And this argument of the exclusion of contracts, and therefore the exclusion of any limitation of the obligation of the owner in such cases, is strengthened as we proceed in the analysis of the section. The first part of it relates to embezzlement, loss or destruction. Embezzlement, of course, excludes the idea of contract; the liability which it induced upon the owner is *ex delicto*. Do the general terms which follow, "loss," or "destruction," include any acts except such as are *ex delicto?* That they do not, is clear, from the class of persons to whose agency they are referred. The "loss" or "destruction," is that of the master, officers, mariners, passengers, or any other person. But the officers, mariners, passengers, or any other person or persons, have no authority by which they can bind the owner to any contract they, or either of them, may make. *The Anne*, 1 Mason, 512. For their wrongful act the owner is liable; and against loss or damage resulting thereby, he is an insurer. The exclusion or limitation of his liability must then manifestly be referred to cases, in which by law the owner might have been made liable, cases of tort and not of contract. It is true the authority of the master to bind the owner in certain cases by contract, is undoubted; but where the master, who might affect the owner either in contract or tort, is joined with a number of persons who could only affect the owner in tort; the rule of construction requires us, in the application of a general rule of exemption, to confine it to cases in which all of these persons are capable of affecting the owner. The next part of the section relates to loss,

damage or injury by collision; this is so clearly tortious that it requires no examination. The last part of the section is, any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of the owner. I have already shown that the exclusion of matters which involve the knowledge or privity of the owner, necessarily exclude the idea of this limitation of responsibility being applied to cases of contract, which imply the existence and presence of both.

The exemption which is claimed in this case, if it arises at all, is under this last part of the section. It is a liability arising, however, from a contract; and I think enough has been said of the import and effect of the terms, without the "knowledge" or "privity" of the owner, to show that contracts are excluded from the section. If, indeed, the words in this part of the section were added, which are found in the first part of the section; and the several things set forth in the last part of the section be connected, with masters, officers, mariners, passengers, or other person or persons, as the persons by whom they are to be done; then the argument for the exclusion of contracts, from the limitation of responsibility, declared by the act, would be made, if possible, still stronger. But although these are not named as the persons whose acts create the liability, yet they are not only to be considered, as if specially named, by the proper rule of construction; but if not considered as named, the last clause is without meaning, and cannot be made applicable to any case. For if it is denied that the master, officers, mariners, passengers, or other person or persons, are to be considered as included in this part of the section; and if the statute excludes the owner and owners; it will be seen that the argument on the one side, and the statute on the other, exclude all human agencies by which the several acts, matters and things could be done. And as the statute excludes the owner or owners; and includes a class of persons whose acts, it is proposed, should not affect the owners except to a certain extent: a subsequent enumeration of other acts, in the same section, with no reference to any other class of persons, and relating also to the same exemption, will be held to refer to the same persons who have been already named. These so named, being persons who

cannot bind the owner by contract, but may by tort; necessarily make the liability from which the owner is excused, that liability only which they could impose. The fourth section of the act, makes the exclusion of any liability arising from contract, still more plain. In it the mode of proceeding is regulated: and the subject matter is "such embezzlement, loss or destruction," which in the first part of the third section is occasioned by the master, officers, mariners, passengers, or other person or persons. It is clear that in the fourth section, all of the divisions or parts of the third section are considered as *ejusden generis*. They must be so considered to participate in the mode of proceeding there established. If they are not so considered; if they do not fall under the head of embezzlement, loss or destruction by the persons named in the section; or if they are not connected with these acts by a rule of construction; then are they not provided for in the distribution.

I am not ignorant of the fact, that the conclusion which I have already foreshadowed of the exclusion of contracts from this act, is perhaps in opposition to the view which has been taken of the act, by others who have had it under consideration. In the case of *Watson* vs. *Marks*, Law Reporter, Jan. 1854, p. 157, Judge Kane does not refer to the distinction taken here; perhaps it was not necessary; for the loss in that case he considered the result of a tortious taking. But his opinion evidently was, that the act embraced cases of contract; and he refers to the examination by Emerigon of the provisions of the ordinance of Louis 14th, as illustrating the policy of this law. Whatever may be our opinion of the construction by Emerigon, Essays on Mar. Loans, ch. 4, sec. 11, it must be remembered that his opinion is but his construction of that law; and that others equally eminent have insisted upon a different construction. Valin adopts the conclusion, that the ordinance referred to does not exempt the owner from a liability in cases of contracts by the master. Pothier concurs with Emerigon. Œuv. de Pothier, 4, p. 348. Pardessus adopts the opinion of Valin; and Boulay Paty, in a brief but admirable summary of the discussion, earnestly advocates the conclusion of Emerigon. Boul. Paty, 2, p. 263. In our language also, Judge Ware, in the *Rebecca*, a reference to which I have already made, has examined the subject with great care and ability,

and has adopted the conclusion of Valin, as that most consistent with the various relations which at this time the owner occupies to the vessel, the master, and those to whom the owner is affected with the obligations of a contract.

But if all the commentators to whom I have referred, agreed as to the policy of the law, and its construction, it could not properly be said to carry with it, a conclusion in the matter which is before me. In the ordinance of Louis 14th, as in the Code de Commerce of France, the rule is stated as a simple proposition; not embarrassed by any context, or circumstances operating to involve it. The doubt in its construction has been really more the doubt of what the law should be, than of what it was. The opinions, therefore, of the commentators, are more applicable to the question of policy, than strictly of construction. Before the ordinance of Louis the 14th, which is said to have embodied the wisdom of the maritime world, the liability of the owner for the acts of the master, of either *ex contractu*, or *ex delicto*, was limited to his interest in the vessel and freight. And when by the clause of the ordinance which limits the liability of the owner, it is claimed—contrary as must be admitted, to the ancient maritime code—that such an exemption did not extend to, or embrace the obligation arising from contracts, it is in fact a departure from the old rule of the maritime law, and the substitution of the rule of the common law. The limitation of the obligation of the owner in cases of tort, but not in contracts, although rejected by Boulay Paty, is admitted by him to have been adopted by the court at Rouen.

It is manifest that the question of construction here really involves another of great importance. It is whether the act of 1851 is to be regarded as a modification of the rule of the common law affecting the contract of a carrier; or the commencement of a system of maritime legislation; the construction and application of which must be considered in connection with that great body of maritime laws, which by the labors of Pardessus, have been collected in one work; and furnish us with all the knowledge which exists, in regard to the maritime law of the world.

In the *Salmons Falls Manufacturing Company* vs. *The Bark*

Tangier, Law Reporter, June 1858, p. 504, the act of 1851 was involved, and came before Judge Curtis. The liability there arose from contract. The learned judge, it is true, held that the case was not within the terms of the act: yet he did not intimate any doubt of the application of the act to a liability arising from contract. He refers to the case of *Morewood* vs. *Pollock*, 18 E. L. & E. R., 342, in which case a question arose under the second section of the 26 Geo. 3, c. 86. That case was strictly confined to the particular section in which the exceptions of fire was introduced, and nothing was said of the general construction of the statute.

But in *Sutton* vs. *Mitchell*, already referred to, the object of the 7 Geo. 2, of which the 26 Geo. 3, was an amendment, is thus explained: "The act, (says Buller, J.,) was meant to protect the owner against all treachery in the master or mariners, as appears from the clause in question; (referring to a general clause corresponding to the last part of the third section of the act of 1851.) It meant to relieve the owners from hardship, and to encourage them; at the same time saying, that so far as you have trusted the master and mariners yourself, so far you shall be answerable; which is to the value of the ship and freight." This protection of the owner from the negligence or delicts of others; so stated in *Rodrigues* vs. *Melhuish*, 28 E. L. & E. R., 485; in *Sutton* vs. *Mitchell*, 1 T. R., 18; is again affirmed with great force in *Lyall* vs. *Mells*, 5 East, 428: although that case did not relate to a statutory exception, but an exception claimed as an agreement of parties. Lord Ellenborough declared that the object of the notice "was to limit the responsibility of the owners in those cases where the law would have made them answer for the neglect of others, and for accident which it might not be within the scope of ordinary caution to provide against."

Since the 26 Geo. 3, various amendments have been made in succeeding statutes, until, in the statute of Victoria, already referred to, all have been consolidated in one general act. It is, however, from this statute of 26 Geo. 3, that our act of 1851, is taken. And it must be remembered that after the 26 Geo. 3 was passed, the 53 Geo. 3 and the 14 and 15 Victoria, were passed; and in both of these statutes material alterations have been made in the act of 26 Geo. 3.

By the 53 Geo. 3, c. 159, an owner is not liable for loss or damage arising or taking place by reason of any act, neglect, matter, or thing done, omitted, or occasioned, without the fault or privity of the owner. It will be seen at once how much more comprehensive is the exemption than that under the former statute. The mode in which the exemption is set forth in the 17 and 18 Victoria, is nearly similar: fault or privity being substituted for knowledge or privity in the earlier statutes. But another important modification was made in the 17 and 18 Victoria: the same liability is preserved for loss or damage arising on each of several distinct occasions, as if no other loss, damage, or injury, had arisen; and the value of the ship is estimated at the time of the loss or damage. A contrary rule, however, has been laid down by Judge Kane in *Watson & Sons* vs. *Marks et al.*, who holds that the value of the vessel is to be ascertained at the time of suit brought; and if the vessel has been wholly lost, there can be no recovery.

It seems to me clear, that if we consider the act of 1851, as anything more than a legislative exception of the liability of the carrier, as the same is enforced at the common law; and especially if we regard it as a rule to be construed by a reference to the general maritime law instead of the common law, much confusion and uncertainty must arise in its application. I have nothing to say as to the wisdom with which in a maritime court, the rule of the common law, originally was introduced. But it has been introduced; is constantly enforced; and is, in cases like this to all purposes, the rule of the maritime law of this country. If we should recur to the rule of the maritime law, it is now a matter of doubt with the ablest commentators how far the liability of the owner for the contracts of the master, is affected by the marine ordinance of France. And the argument which they use, who favor a general application of the exemption, is precisely that which may be urged here against the extended construction of the statute. The rule of the ancient maritime law, which is their guide, is not more clear than the common law rule which these courts have adopted. And surely no proposition can be more bold than that of considering the act of 1851, as repealing the rule altogether of the common law, and sub-

stituting that of the general maritime law. If we regard this act, then, of 1851, as being the declaration of certain exceptions to the liability of the owner at common law, we find ourselves, by reason and authority, assisted in its proper construction. We know that the liability of the owner was general and unlimited, that the application for relief was not suggested by the apprehended consequences of contracts, but *delicts*—that it was asked as a protection from tortious acts, that its application was not liberally made, that it was amended without adding anything to it in the way of contracts; and from the law in this condition we framed our act; that against the application of the exemption to contracts Judge Story has given the weight of his name; that all the cases in the books which have been reported under the 26 Geo. 3, are cases of *delicts;* that Judge Ware has given the weight of his argument to the authority of Judge Story, and has conclusively shown that the relative position of master and owner in former times, out of which grew the limitations of the responsibility of the owner under the ancient maritime law, is wholly changed; and, that although for delicts the limitation of responsibility may be maintained, for contracts made directly by the owner, or by the master with the authority of the owner, there should be no limitation of responsibility.

We have no opinion from the Supreme Court as to the proper construction of this statute; but we have its judgment of the rule of law applicable to the liability of the carrier, where that liability is modified by the operation of a special agreement restrictive of liability. And the rule laid down in 6 Howard, 344, can scarcely be supposed to indicate the willingness of that court to condemn the former rule, unless the obligation to do so is plainly manifested by the legislature. In this act of 1851, I cannot find such manifestation. Indeed, this fact is plainly in opposition to such a conclusion; that the 26 Geo. 3 was adopted as the model of the act of 1851, instead of the 53 Geo. 3; and that the general words of the French code, although, of course, familiar to Congress, were passed over; and those words adopted which were found in a statute, the judicial construction of which we have seen was, that it was intended to protect the owner from the treachery of the master and mariners.

I believe that the 53 Geo. 3 did increase the exemption of the owner, perhaps even to contracts, but that the 7 Geo. 2 and 26 Geo. 3 certainly did not. *The Mary Caroline*, 3 W. Rob. 104; see *Dixon* vs. *Wilson*, 2 B. & Ald. 2; *Brown* vs. *Wilkinson*, 15 M. & W. 391; *Dobree* vs. *Schroeder*, 2 Myl. & Craige, 489. In *Pope* vs. *Nickerson*, 3 Story, 496, Judge Story says, he has looked into the English statutes, from which the statute of Massachusetts was borrowed, referring to 7 Geo. 2 and 26 Geo. 3, and finds them applicable to torts and malfeasance of the master and mariners. *The Dundee*, 1 Hazzard, 109; *Sale* vs. *Laurie*, 5 B. & C. 156; *Wilson* vs. *Dickson*, 2 B. & A. 2; *Morris* vs. *Robinson*, 3 B. & C. 195. In the *Dundee*, 1 Hazz. 109, the language of Lord Stowell is explicit, in considering the 7 Geo. 2 and 26 Geo. 3, as applicable to cases of torts, and the 54 Geo. 3 as extending the operation of the exemption. How far in itself it extends the exemption, or how much further still it has been extended by the 17 and 18 Victoria, need not be discussed; the construction of the 26 Geo. 3, the statute after which the act of 1851 was framed, being only material for us.

But, if in this construction of the statute I should have erred, there is another ground upon which it seems to me that the owner is not entitled to the benefit of the act. The rule of law admits a limitation of liability by special exceptions, which, when made, constitute the contract. To this, however, the assent of the parties must be matter of evidence. A notice is not an exemption of the carrier unless the other party assents to it. No law of which I have any knowledge, has declared that in regard to all contracts which the owner makes himself, he shall be bound thereby only to a limited responsibility. And no exemption arising from any legislative declaration can be stronger, than if agreed to by both parties as a special contract, which, when it exists, is said to be the law of that case. In this case the contract was with the master, but it was strictly within the limits of his authority; and became the contract of the owner, as complete and binding upon him, as if he had personally made it. The law connects with this contract a representation, presumed to have been given; inserts in it a covenant presumed to have been made; and that representation the law declares shall

proceed from the owner; and that covenant be considered as made by him. It has ever been the policy of the law to refer the liability for seaworthiness directly to the owner, and hold him liable for it. A loss from that cause is held to be a loss proceeding from a failure in a representation of the owner, a breach in his covenant. If under the general words of the act of 1851, this limitation of liability is inferred in contracts of affreightment, it must include other contracts also; but how can it exclude any liability resulting from the contract of the owner when the exemption does not extend to anything done with his "privity" or "knowledge?" How can you affirm a want of knowledge of a representation, which by a presumption of law the owner is held to have made; or a want of privity in a matter of contract, which by a like presumption, he is held to have executed? Even if it were so, that Congress would consider it proper to limit the owner's liability for the contracts of the master; upon what principle would it be urged that the liability of the owner for his own contracts should be limited? To say that the owner is not liable for the breach of his contract, by his agent, if the breach is without privity or knowledge of the owner, is to reverse the universal rule that the act of the agent in the execution of a certain duty is the act of the principal who employs him; and to hold, that a principal can discharge himself of the obligation resulting from his contract, by committing to the agency of another that for which he bound himself. Indeed, I consider the true principle in an analagous case well laid down in *Rodrigues* vs. *Melhuish*, 28 E. L. & E. R. 475, in which the question was agitated concerning the liability of the owner when a pilot was in charge. The court then said: "The law now is, not that the owners are exonerated from the consequences of an act of negligence, but that they are bound to show that the negligence was the act of the pilot." Although by positive enactment, when the pilot was in charge, the owner was declared not liable, still, with the pilot on board, and in charge, the owner was held bound to prove that the negligence was the act of the pilot. Failing to do so, the owner would be liable. And so it is here: heir liabilit- for others is limited in cases which may be without their privity or knowledge; and it is for those who in such cases

seek to change them, to show on their part privity or knowledge. But where the fact of privity and knowledge is a presumption of law, as is the case in every valid contract of the owner, the operation of the act of 1851 is excluded by its own language.

I have not adverted to the considerations of policy or inconvenience urged in the argument, because these I consider fallacious aids generally in the construction of a written law. I have preferred to rest this judgment upon the cotemporaneous exposition of the statute of Great Britain, from which the act of 1851 has been taken; (15 M. & W. 391; 3 W. Rob. 101; 2 Mylne & Cr. 489,) the acquiescence in that construction ever since; and the congruity of that construction with the rules which are applied in cases of this kind as the rules of the maritime law. Rules which, although derived from the common law, are enforced in maritime contracts without regard to their source; and are now so interwoven with that jurisdiction in this court, that nothing less than their special abrogation would authorize this court in regarding them as superceded, however they may be modified by agreement of parties or legislation.

With these views I must refuse the prayer of the petitioner.[1]

In the Supreme Court of Michigan, at Lansing, Jan. 9th, 1860.

CHARLES A. LORMAN *vs.* HENRY E. BENSON.

1. In Michigan there are no tide-waters which come within the technical meaning of the term "navigable," as understood in the common law.
2. The circumstance, that the State of Michigan has more than a thousand miles of external boundary waters open to navigation, in a popular sense does not require the rule of the common law to be modified so as to apply the doctrines belonging to tide-waters navigable in a common law sense, to such waters as are beyond the tidal influence.

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[1] The parties appealed from this decree, and the question raised was argued before Judge Wayne, of the Supreme Court. A doubt was expressed upon the point, how far the case admitted of an appeal, as no final decree had been made in the principal case. Judge Wayne therefore delivered no final opinion in the case. The appeal was never afterwards prosecuted; and the opinion herein given was acquiesced in.

3. Hence, a defendant was held liable, in special damages, for obstructing the plaintiff in taking ice, by compelling him to travel, at a greater expense, a greater distance, by reason of the placing of a boom in the stream opposite the riparian owner's shore.
4. The rights of riparian owners discussed, and the cases cited and commented on.
5. Rights of navigation discussed.

Case reserved from Wayne Circuit Court.

The defendant being in possession of the premises in question, being a portion of the Detroit river, occupied it with a boom, under a license from the plaintiff's grantor, whereby he is allowed to use it until leased or otherwise disposed of, when his license was to determine. The plaintiff, upon obtaining a lease, notified defendant to remove his boom, in order to enable plaintiff to have the free use of the premises for gathering ice to fill his ice-houses adjacent, during the ensuing winter. Defendant refused to remove, and plaintiff sued him for trespass, averring special damages for the obstruction to his taking ice, he being compelled to go to a greater expense and travel a greater distance to obtain it. Upon this state of facts, the Circuit Court for Wayne county reserved several questions involving the riparian rights of land owners and the right to sue for and recover such damages as were claimed.

George E. Hand and *T. Romeyn*, for plaintiff.

Alfred Russell, for defendant.

The opinion of the court was delivered by

CAMPBELL, J.—The rights of the plaintiff in this case depend entirely upon the doctrines applicable to riparian proprietors upon the water communication, which is known as Detroit river.

Some reference was made on the argument to the general system of law prevailing here, in view of the former history of the country; but we deem it useless to enter into any extended examination of this question. It is undoubtedly true, that at one time the custom of Paris was in force here. It was expressly abrogated by the territorial legislature in 1810, and probably applied to very few cases then, if to any. Practically the common law has prevailed here, in ordinary matters, since our government took possession, and the

country has grown up under it. How, or by what particular means it originated, would open an inquiry more curious than useful. A custom which is as old as the American settlements, and has been universally recognized by every department of government, has made it the law of the land, if not made so otherwise. Our statutes, without this substratum, would not only fail to provide for the great mass of affairs, but would lack the means of safe construction. We are of opinion that questions of property not clearly excepted from it, must be determined by the common law, modified only by such circumstances as render it inapplicable to our local affairs. Such was the view taken in *Stout* vs. *Keyes*, 2 Doug. Mich. R., 184, and in the opinion of Mr. Duponceau, cited in 1 Bish. Cr. Law, § 15, n. 4.

There are no tide-waters within this State, and therefore no waters which by the technical meaning of the term "navigable" at common law, would come within it. But we have more than a thousand miles of external boundary waters, which are open to navigation in the popular sense, and many interior streams valuable for purposes of public convenience and passage. The inquiry before us is, whether our circumstances require the common law rule to be so modified, as to apply the doctrines belonging to tide-waters, navigable in the common law sense, to these waters, which are beyond the tidal influence.

By the ordinance of 1787, these waters, which are there designated "navigable," are declared to be public highways. No special force can be derived from this language, however, for it applied very evidently not only to ship and vessel navigation, but more generally to the passage of canoes and batteaux, which were then the chief means of conveyance, there being few large vessels and fewer land roads. But the ordinance couples with the waters the portages or carrying places connecting them, and which were used by the parties making long voyages in small boats, in passing from river to river. Such were the portage between Fox and Wisconsin rivers, that around the Falls of St. Mary, and others. We are therefore compelled to look at the nature and situation of the streams themselves, and not to any mere verbal nicety. And it becomes necessary to glance at

the rules of the common law as applied in England, and to see how and wherein our position may require a modification of them.

There are, in England, two kinds of water highways. All rivers and streams above the ebb and flow of the tide, which are of sufficient capacity for useful navigation, are public rivers, and subject to the same general rights which the public exercise in highways by land, to which Lord Hale aptly likens them. In these streams the adjacent proprietor owns the banks and bed, and has a right to make such use of this land, and of all benefits of the stream, as will not interfere with the public easement or servitude. Formerly it was doubted whether a right to the use of the bank for towage was not appurtenant to the public easement of navigation, but it is now declared to exist only in particular places by local usage. *Ball* vs. *Herbert*, 3 T. R. 263; *Blundell* vs. *Catterall*, 5 Barn. & Ald. R. 268. Wharves, or other appropriations of the bed of the stream, were only allowed, so far as they did not actually obstruct free navigation; and when they did so they were indictable as public nuisances. Their analogy to highways was complete. Hale de Jure Maris, ch. 2, 3.

All navigable waters in which the tide ebbed and flowed were also public highways. The right of navigation was precisely like that in other public rivers, and there was no right to use the banks for towage. But there were some important distinctions to which we must carefully attend. The grant of land bounded by the stream did not convey the fee to the centre or thread of the stream, but stopped at the line of ordinary high tides, which is declared in the late case of *Attorney General* vs. *Chambers*, 27 Eng. L. & Eq. R. 242, not to extend up to the line of the highest tides, but to that medium line which is the average bound of ordinary and natural high tides throughout the year. The shore (which signifies the land between high and low tide,) and the bed of the stream, were the property of the king or of individuals, but presumed to be in the king until shown to belong elsewhere. When owned by the king, it was as part of his *jus privatum*, and subject to be disposed of by him until restrained. See *Attorney General* vs. *Burridge*, 10 Price, 350; *Attorney General* vs. *Parmeter*, 10 Price, 378; *Parmeter* vs. *Attorney*

General, 10 Price, 412. And it is subject to substantially the same rules and burdens whether owned by the king or by private persons. *Mayor of Colchester* vs. *Brook*, 7 Ad. & El., N. S., 339, and cases above cited. The public had a right of navigation over the whole bed of the stream at high tide, and over the water, so far as it was practicable, at all tides. As this was a common law right, and only to be repealed by parliament, the king could not, neither could any one by his authority, make any erections which would obstruct navigation. Thus far his rights were qualified by the public easement, precisely like those of a private owner, in the bed of a public stream above tide-water. In both classes of streams the public easement controlled the use of the land. The easement reached the high-water line whenever the tide was up, and prevented any permanent improvements below that line as effectually as below the ordinary river margin, and no more so, and for no different reason. The owners of the soil in both streams could make any erections which were not nuisances, and their character as nuisances was to be determined as a question of fact. *King* vs. *Tindal*, 1 Ad. & El. 143; *Regina* vs. *Betts*, 22 Eng. L. and Eq. R. 240, Hale de Port. Mar. pt. 2, ch. 7, p. 85. The legislature could grant to the owners in either case the right to make such erections as would otherwise be unlawful, for they may determine or extinguish any public right; and this power has frequently been exercised; and, when occupied for public use, by railroads or other works, the owner, whether king or subject, is entitled to his damages for the use of it. See *Rex* vs. *Montague*, 4 B. & C. R. 598, *Abraham* vs. *Great Northern Railway Company*, 5 Eng. L. & Eq. R. 258.

The principle which gives the land between high and low water mark to the crown, is said, in the case of the *Attorney General* vs. *Chambers*, (above cited,) to be "that *it is land not capable of ordinary cultivation or occupation;* or, according to the description of Lord Hale, as generally dry and manurable; and so it is in the nature of unappropriated soil. Lord Hale gives as his reason for thinking that lands only covered by the high spring tides do not belong to the crown, that such lands are for the most part dry and manurable; and, taking this passage as the only authority at all

capable of guiding us, the reasonable conclusion, is that the crown's right is limited to lands which are, for the most part, not dry or manurable." See also *Lowe* vs. *Govett*, 3 B. & Ad., 863.

Here, then, we have the doctrine very clearly maintained, that the riparian owner takes all the land which is of any use for ordinary purposes, and all which is not commonly submerged by the average ordinary high tides, which would seldom leave any of the shore dry more than twenty-four hours at a time. It is not reserved, therefore, as useful land, but as waste land which is characterized by the water service over it; and the firm land, which is made by alluvium, becomes private and not crown property. *Gifford* vs. *Lord Yarborough*, 5 Bing. R. 163; *Scratton* vs. *Brown*, 4 B. & C. 485. But as the public are sometimes said to have rights to some easements on the shore, it may be well to notice what those rights are.

The case of *Blundell* vs. *Catterall*, 5 Barn. & Ald. R. 268, contains a more full investigation of this subject than any other modern case to which our attention has been called. As we have already seen, the public rights are in general the same, whether the soil of the bed and shore of tide-waters is owned by the crown or by individuals. In the case now referred to, the plaintiff, a private person, owned the shore and upland, and brought an action of trespass against the defendant for crossing the shore, on foot and with carriages and bathing machines. The defendant justified on a claim of a public right of way for bathing purposes. The case was considered by the court upon the general law of the land, and may be regarded, therefore, as a fair exposition of it. It was held by all the court, except Best, J., (Abbott, C. J., Holroyd and Bayley, JJ., concurring) that no general right existed under which the defendant could justify. And it was laid down as a general rule that the public rights over the shore existed not as land but as water-rights, to be exercised when the land was covered by the tides. The only public rights recognized as commonly existing on such waters were those of navigation and fishing, and it was left undecided whether any common right of fishing could ever exist where the soil was private. And it was very clearly held that no one could of right

plant stakes or other temporary or permanent conveniences for drawing nets on any part of the sea-shore, whether private or not, except the land owners. The right of landing, and of loading and unloading, was held to exist (except by particular custom) only in ports and established landings. And, while it was said that it was common to use the shore for various purposes of passage, that use was regarded not as rightful but merely by sufferance, and analogous to the frequent passage over unenclosed lands, which was not lawful, but was seldom complained of.

When, therefore, we look at the state of the common law upon the subject before us, it is very evident that the ebbing and flowing of the tide, and not the mere susceptibility of the stream to purposes of useful navigation, has made the distinction between the rights of riparian owners on the fresh and tidal public streams of England; and that, where these happen also to own the shore on tide-waters, their ownership is not distinguishable for any useful purpose, if at all, from their dominion over the beds of fresh-water public rivers. By giving in all cases the whole extent of dry and available land to the bordering owner, the law left to the crown in any case a very unprofitable ownership, which could rarely aid him, or any grantee, unless the latter owned also the upland.

In both kinds of public streams the rights of navigation were the same, and, so far, the public at large had no interest whatever in the question of ownership of the bed of the water. The right of fishing in navigable rivers was not originally a general common-law right of every subject, excluding the possibility of a private right to a several fishery, but a prerogative right of the crown, and grantable with, if not attached to, the soil in private hands. Considering the high esteem in which navigation was held in England, we may be sure that no principle would have been allowed to grow up into common law, which would materially impair the shipping interest. And the adjudged cases recognize the common sense doctrine that it did not matter who held the fee of property, so long as the public easement was maintained. We do not find that the public rights over navigable waters, belonging with their beds to manors, were any more hampered than when the title was in the

crown. The doctrine that the whole public easement ceased with the destruction of the navigable character of the waters, is intimated in *Rex* vs. *Montague*, 4 B. & Cr. 498, and strongly confirms *Blundell* vs. *Catterall*, in the limitation of public rights not depending on navigation.

The Roman law recognized the title of the river beds as belonging to riparian proprietors, subject to the public easements of passage and towage, and of moorage on the banks. The modern civil law is said to be generally different in this respect; but it is laid down by Justinian, that all newly formed islands belong to the riparian proprietors, and Vinnius demonstrates that this right is incident to and derived from the ownership of the bed. Vinnius, Com. on Justin., lib. 2, tit. 1, §§ 4, 5, 20, 22, 23. And see, also, the opinion of the Chancellor, in *Canal Appraisers* vs. *The People*, 17 Wend. R. pp. 592–3.

It is also worthy of remark, that in this country, in most of the States where it becomes necessary to discuss tide-water rights, all of the modifications made have been in favor of riparian owners, extending their privileges beyond those at common law. We do not deem it necessary to review the many cases cited on this subject by counsel. They differ in many particulars, but in most of them we perceive an enlargement of riparian privileges, and in no case is there any curtailment of them.

In applying the principles of the common law to the tideless stream in question, we do not perceive what public interests would be subserved by placing it on the footing of tide-waters, when the rules applying to public fresh-water streams provide amply for every common easement. The right of navigation, to which all others are subservient, is in no way injured or abridged by this holding. And the necessities of wharves, and other conveniences, which could not be made available at all in such a stream as this, unless owned by the riparian proprietor, (because not accessible except over his grounds,) would be an inducement to modify the common law, were it otherwise, rather than change it as it is now. We can perceive no advantage to the State in setting up a barren and useless title.

We think that in this respect the common law is already adapted to our circumstances, and needs no changing.

It is urged that this ruling will interfere with the improvement of rivers, and disturb the title of islands. But these objections are not well taken. The public authorities can regulate water highways as well as land highways, although the soil of neither belongs to the State. And if the government see fit (as is the case with all islands in this river, which have not only been kept separate as property from the mainland, but most have been named and distributed between Great Britain and the United States by treaty) to regard each island as a separate property, this infringes no common-law rule. Islands have always been susceptible of separate ownership, and when so separated the *filum aquæ* is to be drawn between them and the main land. The facts before us create none of the embarrassments which have been suggested to us, and we have no difficulty in holding that the plaintiff is entitled to every beneficial use of the property in question which can be exercised with a due regard to the common easement. The cutting of ice is the exercise of a valuable privilege in securing that which has become stationary on the freehold; and we can conceive of no reason which would justify a denial of it. And we think a trespass creating an obstruction which prevents it, justifies a finding of damages for this as a direct consequence of the injury. *White* vs. *Mosely*, 8 Pick. R. 356. The right to raft logs down the stream does not involve the right of booming them upon private property for safe keeping and storage, any more than the right to travel a highway justifies the leaving of wagons standing indefinitely in front of private dwellings or stores. And the booms in question were erected under a license from the plaintiff's grantor now determined, and not under any right, or claim of right, as appurtenant to navigation.

The cases cited from Ohio, Indiana, Illinois and Wisconsin, as well as from some of the older States, show, as we think, that the common-law rule is the most desirable one, so far as fresh streams are concerned.

Had the usage of this region been inconsistent with the rule

we have adopted, that might afford some reason for doubting its applicability. But usage has uniformly conformed to it, and, so far as we have any legislation bearing upon the subject, it recognizes the rights of private owners fully. The charter of Detroit, passed in 1827, contained the following provisions: "That nothing in this act contained shall be construed to vest in the said corporation, or any officers thereof, any right to the water, or the land under the water, in front of the farms included within the said city; nor any power to erect, or cause or authorize to be erected, any wharf or other thing on the said land; *but the right of the proprietors of the said farms to the water and land in front of said farms, and to fill in the water and erect fixtures thereon, shall remain and vest in said proprietors the same as if this law had not passed.*" R. L. of 1827, p. 588, § 49. This provision was preserved in terms until the passage of the new charter of 1857, which indirectly recognizes the same principle, by giving to the city power to regulate navigation, and to build wharves on their own property, but, as to all other property, merely to establish a line beyond which wharves shall not extend. L. 1857, p. 95. The right of individuals has been constantly asserted and exercised.

We think that the plaintiff has, under his lease, a legal interest in the land covered with water, which will support the action of trespass; and that the hindrance in taking ice was the proper subject of damages under the case presented.

The other Justices concurred. Ordered to be certified accordingly.

In the Supreme Court of Pennsylvania—At Pittsburgh, October 31, 1859.

COMMONWEALTH *vs.* REED ET AL.

1 Works of internal improvement, erected at the expense and by the officers of the State, for the benefit of the citizens at large, never can be regarded by the law as a nuisance; and their transfer to the hands of a private company, with a requirement that they shall be kept up for the purposes of their creation, in no respect changes their character.

2. The Commonwealth and its agents could not have been indicted therefor, and the company and its officers occupy precisely the same position.

Error to the Quarter Sessions of Crawford county.

J. W. Farrelly, for plaintiff in error.

Finney and Douglass, contra.

The facts are sufficiently stated in the opinion of the court, which was delivered, Oct. 31, 1859, by

READ, J.—The President and Directors of the Erie Canal Company are indicted for a public nuisance, for keeping up and maintaining a certain pond and reservoir as a part of their canal, by damming the southern end of the Pymatuning swamp, by means of which seven hundred acres of land are overflowed, and the waters in the said pond and reservoir have become stagnant, putrid and noxious, from whence unwholesome damps and smells arise, and the air is greatly corrupted and infected, to the great damage and nuisance of the citizens of the Commonwealth. There is also an allegation that the pond and reservoir are not necessary for the purposes of the canal, and ought to be dispensed with as useless and injurious. To this indictment the defendants have pleaded specially, that the pond and reservoir are a part of the internal improvements of the Commonwealth called the Erie Division of the Pennsylvania Canal, which was constructed by the Commonwealth for a public highway, and that the alleged nuisance was created, constructed and erected by the authority, and in pursuance of laws of the General Assembly of this Commonwealth, by the officers, engineers and agents thereof, lawfully created, appointed and employed therefor, for the purpose of securing and furnishing sufficient water for the supply of the said Erie Division of the Pennsylvania Canal, and that the said defendants are in possession of the said pond and reservoir, in pursuance of the act authorizing the Governor to incorporate the Erie Canal Company, as directors of said company; and by the terms of the Act of Incorporation they are obliged to keep up the alleged nuisance for the purposes of the canal, in order that it may remain a public highway, and for the protection of the property reserved by the Commonwealth. To this plea there is a general demurrer.

This indictment, it will be perceived, is not against the corporation, but against its officers, but no difficulty has been made on this

point by the defendants, and the question has been argued upon the broad ground, whether upon the facts declared in the pleadings this is a public nuisance. The indictment shows that the works complained of were connected with the Erie Canal, and the plea shows that they were constructed by the Commonwealth as a necessary part of the Erie Division of the Pennsylvania Canal, and are held by the Erie Canal Company, as the grantees of the State, and are to be kept up by them in order that the canal may remain a public highway.

We should suppose, that works of internal improvement, erected at the expense, and by the officers of the State, for the benefit of the citizens at large, never could be regarded by the law as a nuisance, for the sovereign authority has expressly intended them to advance the prosperity of the community. If this be so, how is it possible that their character should be entirely altered by being placed in the hands of a private company, with an express requirement that they should be kept up for the purposes of the canal, in order that it may be and remain a public highway. The Commonwealth and its agents could not have been indicted, and it seems clear, that the company and its officers occupy precisely the same position.

It would indeed be strange that any legal proceedings could be instituted, in a county through which a great public work passes, by which the whole purposes of the improvement might be destroyed, upon the single allegation, that what has been constructed under the express authority of the legislature is a great public nuisance.

It will be observed, that it is not alleged that there is any damage to property (that no doubt has been paid for by the Commonwealth) but that it is injurious to the health of the inhabitants residing there. It appears by the indictment that it was originally a swamp, but whether healthy or otherwise is not stated.

Now this general charge would have applied equally well to every canal or slackwater navigation in the State, whether built by the State or private companies, to the whole line of the Pennsylvania Canal, whether on the Juniata or the branches of the Susquehanna, or west of the mountains, or on the Delaware, to the Schuylkill navigation, and to a host of similar works. Every dam under the

act of 1803, and every common mill dam would be open to the attack of the public prosecutor. The inevitable consequences of changing the course and current of rivers and streams by dams and obstructions, is to occasion a kind of malaria, in the first instance, which disappears generally in a few years. The same effect is produced in the outskirts of our cities, by the opening up of the fresh earth in the progress of improvement, until the district is graded, paved, and properly drained.

Upon the principle of this indictment, the rice plantations of Georgia and of Louisiana should be abated.

The judgment is affirmed.

In the Supreme Court of Pennsylvania—At Pittsburgh, Nov. 1859.

STOKELEY *vs.* THOMPSON.[1]

1. Where, in a bond, interest is made payable annually, and there is a failure to pay it when due, interest on the unpaid interest is not recoverable without a special agreement to that effect.
2. Whether an agreement to pay interest on interest, in order to be good, must be made subsequently to the original obligation or not, or what constitutes its precise consideration, not determined.

Error to the Common Pleas of Greene county.

The facts are sufficiently detailed in the opinion of Mr. Justice Thompson.

Downey and Rowe, for plaintiff in error, cited *Dodye* vs. *Perkins*, 9 Pick. 368; *People* vs. *New York*, 5 Cowen, 331; *Boker* vs. *Fisher*, 4 Wh. 516; *Miller* vs. *Bank of Orleans*, 5 Wh. 503; *Faieholt* vs. *Reed*, 15 S. & R. 266; *Hamilton* vs. *LaGrange*, 2 H. Bl. 144; *Greenleaf* vs. *Kellogg*, 2 Mass. 568; *Freye* vs. *Watson*, 5 S. & R. 220; *Pawling* vs. *Pawling*, 4 Yeates, 220; *Bainbridge* vs. *Wilcox*, 1 Bald. 536.

Sayers for defendant in error, explained cases cited above of *Hamilton* vs. *Le Grange*, and *Pauling* vs. *Pauling*, and cited *Sparks* vs. *Garrigues*, 1 Bin. 165, 7 Greenleaf, 78; *Connecticut* vs. *Jackson*, 1 J. C. Rep. 14; *Renshooten* vs. *Lawson*, 6 J. C. Rep. 313, 4 Rand. 408, 411.

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[1] We are indebted to the Pittsburgh Legal Journal for this case.—*Eds. Am. L. Reg.*

The opinion of the court was delivered, Nov. 17, 1859, by

THOMPSON, J.—The defendant purchased a tract of land from the plaintiff and covenanted to pay for it in annual instalments with interest; "and upon the full and complete payment of the said sum of money, together with interest at the times mentioned," the plaintiff bound himself to make to him a deed in fee simple therefor.

In this action to recover for a breach of covenant by the vendor for not making a deed to the vendee, the defendant, who is the plaintiff in error, set up as a defence that there was a balance of purchase money due and unpaid, and that he was not obliged to make a deed until full and complete payment by the plaintiff below. To maintain this position he claimed that as interest on the unpaid purchase money was not paid annually, he was entitled to interest on the interest thus unpaid, or compound interest. By this process his vendee would have still been in debt to him on the articles. But the court below overruled this view of the case, and for doing so this writ of error was sued out, and the case is here on this point alone.

Interest is a compensation for the detention or use of money; and it has its origin in the usages of trade, by contract or by statute, and hence the laws and practice in regard to it are as diversified as the trade, habits of the people, or their peculiar laws may be. While it assimilates in certain matters in various communities, it differs widely in others. In Massachusetts it has been held in several cases where interest was sued for and recovered, being payable annually, that interest might be recovered as if the suit had been on an instalment, and so in some of the other States of this Union. But it will not advance our present purpose to enter into a disquisition in regard to diversities in different communities on this subject.

In *Pawling's Ex'r's* vs. *Pawling's Adm'r's*, 4 Y. 220, the subject is elaborately and learnedly discussed by Mr. Justice Yeates. It was a case where an agreement endorsed on the bond, almost a year after its date, and in which it was recited that "whereas from our local circumstances, or from some other cause, the said interest," referring to the annual interest to be paid by the terms of the bond,

"or some part thereof may remain unpaid for a considerable time after due," the obligor agrees to pay interest on the interest if it remained unpaid at the expiration of three months after due; it was held that interest on the unpaid interest was recoverable, and that the contract was not usurious. In a note to Sillick & French, 1 Conn. 32, in 1 Amer. Lead. Cases, 633, it is said "an agreement to pay interest on interest is not usurious nor illegal;" 3 New Hamp. 40, "and the better opinion is, that at law such an agreement made either at or after the time of the original contract will be enforced, citing cases of *Pawling* vs. *Pawling*, 4 Y. 220; *Comp.* vs. *Boles*, 11 Conn. 448; *Gill* vs. *Chisolm*, 2 Nott & M'Cord, 38. But in *Connecticut* vs. *Jackson*, 1 Joh. 14, Ch. Kent says: "Interest upon interest, or compound interest, is never allowed, unless in special cases, as where there is a settlement of accounts between the parties, after interest has become due, or there has been an agreement for that purpose, *subsequent* to the original contract." Whether an agreement to pay interest on interest in order to be good, must be made subsequently to the original obligation or not, or what constitutes its precise consideration we are not called on to determine. The cases are cited to show that interest on interest is never an incident (unless where there has been a settlement judgment, or the like, which produces a new principal, aggregating the principal and interest which had fallen due) but only where there exists a special agreement to do so in such form as to be valid.

In the case in hand, there was no agreement to pay interest on interest, it is claimed as an incident of the non-payment of the annual interest, and that it should be calculated up to the end of each year, and then become principal, upon which interest should be recovered the next year, and so *toties quoties*, until paid. This is just the process of compounding interest, and within the definition.

In *Sparks* vs. *Garrigues*, 1 Bin. 165, it was decided, "that on a bond for the payment of interest annually and of the principal at a distant day, the interest may be recovered before the principal is due; but that the plaintiff would not be entitled to charge interest on the annual interest on the bond." This seems to have settled all controversy on this point up to the present time, for I have not

been able to find any subsequent case in this court until now. There was a decision to the same effect by the Common Pleas of Union county, 3 Pa. L. J. 400. The uninterrupted practice in Pennsylvania, it is believed, has been in accordance with the case of *Sparks* vs. *Garrigues*, and such is undoubtedly the law.

"Interest upon interest," says Chief Justice Kent, in the case cited *supra*, promptly and incessantly accruing, would, as a general rule, be oppressive. Debt would accumulate with a rapidity beyond all ordinary calculations and endurance. Common business cannot sustain such overwhelming accumulations. It would tend also to inflame the avarice and harden the heart of the creditor. Some allowance must be made for the indolence of mankind, and the casualities and delays incident to the best regulated industry; and the law is reasonable and humane, which gives to the debtor's infirmity of want of precise punctuality some relief in the same infirmity of the creditor. If the one does not pay his interest to the uttermost farthing at the very moment it falls due, the other will equally fail to demand it with punctuality. He can, however, demand it, and turn it into principal, when he pleases, and we may safely leave this benefit to rest upon his own vigilance or his own indulgence."

Compound interest as a compensation merely for the detention of money, has never been allowed in Pennsylvania. HUSTON, J. in *English* vs. *Harvey*, 2 R. 309, in remarking on *Say's Executors* vs. *Barnes*, 4 S. & R. 112, said, "no man during his lifetime can get compound interest from his debtor, and I am not sure that any man in this country can subject those who come after him to get it."

The Court of Common Pleas were right in refusing it, in the case before them.

The judgment is affirmed.